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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 01-131
Table of Allotments,	)	MM Docket No. 01-133
FM Broadcast Stations	)	
(Benjamin, Texas)	)	
(Mason, Texas)	)	

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Rawhide Radio, LLC ("Rawhide"),[1] by its counsel, hereby opposes th Applicatio **for** Review filed by Charles Crawford on February **4,** 2003 in the above-captioned proceedings. Rawhide is one of the Joint Parties that filed a Counterproposal in MM Docket No. 00-148 (Quanah, Texas). The Application for Review argues that the Commission should not have dismissed Crawford's Benjamin and Mason, Texas proposals due to the pendency of MM Docket 00-148 even though they conflicted with the Counterproposal and were late filed. Crawford argues that he could not have reasonably foreseen that he needed to file his Benjamin and Mason proposals by the comment date in MM Docket 00-148. He also argues that the Joint Parties, who filed the counterproposal with which his proposals conflict, were involved in a scheme with the Quanah petitioner meant to subvert the opportunity for others (e.g., Crawford) to file counterproposals. With respect to Crawford's first argument, the Commission has long held that the announcement in a formal notice of proposed rule making of the filing of a petition for FM rule making provides adequate notice to parties that different channels could **be** allotted

[1] Rawhide is one of the Joint Parties referred to in Crawford's Application for Review. The decision of the other parties involved in the Quanah Counterproposal not to respond to Crawford's arguments should not be taken to mean that they agree with any of those arguments.

and additional communities could be affected other than those set forth in the notice. Crawford's other argument with regard to the Joint Parties is mere speculation with no basis in fact, and is not worthy of consideration by the Commission. In support hereof, Rawhide states as follows.

I. INTRODUCTION

1. The ***Notice of Proposed Rule Making*** in MM Docket 00-148, 15 FCC Rcd 15809, 15813 (2000) stated that any proposals in conflict with the proposals under consideration therein must be filed by October 10, 2000. The Joint Parties timely filed their Counterproposal on October 10, 2000. Crawford filed his Benjamin petition on May 18, 2001 and his Mason petition on May 25, 2001, **well** after the deadline for consideration in **MM** Docket 00-148. These proposals conflicted with the Joint Parties' timely filed counterproposal; accordingly, they were dismissed as untimely. ***Report and Order,*** 17 FCC Rcd 10994 (2002), and ***Report and Order,*** 17 FCC Rcd 11038 (2002). Crawford petitioned for reconsideration of those decisions, and the Commission denied his petition for reconsideration. ***Memorandum Opinion and Order,*** DA 03-48 (rel. Jan. 17, 2003). Crawford's Application for Review raises the same arguments that were previously rejected in connection with his Petition for Reconsideration. Crawford recognizes that he filed too late to be considered in conflict with the proposals in the **Quanah** proceeding but argues that he could not have foreseen the "humongous" filing by the Joint Parties, which, he argues, did not meet the "logical outgrowth" test. ***See Weyerhauser Company v. Costle,*** 590 F.2d 1011 (D.C. Cir. 1978).

2. Crawford is basically using the Benjamin and Mason dismissals as a direct attack on the Commission's FM allotment rule making process. This attack is unfounded for at least three reasons. First, the Joint Parties' counterproposal complied with the Commission's requirements, which are well-grounded in the Administrative Procedure Act, and was no more or less foreseeable than any other of the myriad counterproposals routinely processed **by** the

Commission. Second, even if Crawford's Benjamin and Mason proposals were considered in connection with MM Docket 00-148, they would be denied under the Commission's Section 307(b) comparative criteria. Finally, if what Crawford says is true – he would have filed his Benjamin and Mason proposals earlier if only he had had notice – then he simply sat on his rights too long. The allotment process operates on first come, first served principles, and any delay in filing a proposal risks preclusion by an earlier-filed application or proposal.

II. The Notice in MM Docket 00-148 Complied with the Administrative Procedure Act.

3. The Appendix to the ***Notice*** in **MM** Docket 00-148 contained standard provisions notifying the public that timely filed counterproposals would receive cut-off protection, and that different channels could be allotted to any community involved. Specifically, it stated "the filing of a counterproposal may lead the Commission to allot a different channel than was requested at any of the communities involved." 15 FCC Rcd 15809, 15814 **(2000).** The Commission has repeatedly and definitively held that these notice provisions comply with its obligations under the Administrative Procedure Act. ***See, e.g., Pinewood, South Carolina,*** 5 FCC Rcd 7609 (1990). It has been upheld in this regard by the courts of appeals. ***See, e.g., Owensboro on the Air v. U.S.***, 262 F.2d 702 (D.C. Cir. 1958).

4. In ***Pinewood.*** the Commission stated:

> Because a notice of proposed rule making in a channel allotment proceeding specifically elicits counterproposals and alerts all interested parties that alternate channels may be substituted for either the original proposal or the counterproposal, both the actual counterproposal advanced by the proponent **and** any alternate channel are within the scope of the notice. ***Parties contemplating the filing of a petition for rule making that may conflict with an alternate channel for the original community or a community that may be specified in a counterproposal must do so by the comment date in order to have their proposal considered as part of that proceeding.*** We are not required by the Administrative Procedure

Act to issue separate Notices for every channel under consideration.[2]

5. But Crawford complains that this case is different. The difference, he says, is that the Joint Parties' Counterproposal was "humongous," and the cited cases do not apply to "humongous" proposals. Crawford is wrong on the facts. There have been numerous proceedings since the FM Table of Allotments was created about 40 years ago that contained multiple proposals stretching across entire states. The Joint Parties' Counterproposal is not uniquely large or complex. Indeed, it contains fewer communities than some proposals the Commission has handled in the past.[3] Moreover, it is far less preclusive than many routine AM applications, which can affect communities thousands of miles away. ***See Clear Channel Broadcasting in the AM Broadcast Band,*** 78 F.C.C.2d 1345, 1350 (1980).[4] In comparison to this, the 200-mile distance from Benjamin to Quanah, which Crawford seems to think of as too large for imagination, actually looks small. In any event, any counterproposal, even if it involves only a single Class C channel, could impact and preclude other proposals for hundreds of miles in all directions. Moreover, a proposal for one channel can result in the substitution of a different channel that was not anticipated. The Joint Parties' counterproposal is no different from any other proposal in this respect.

6. Just as he did in his Petition for Reconsideration, Crawford cites ***Weyerhauser, supra,*** and ***National Black Media Coalition v. FCC,*** 791 F.2d ***1016*** (2d Cir. 1986) in support of his argument that the Commission gave him inadequate notice, but those cases do not support his

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2 5 FCC Rcd 7609 at 7610 (footnote omitted and emphasis added).

3 ***See, e.g., Cross Plains, Texas et al.***, 15 FCC Rcd 5506 (2000).

4 The current AM window filing procedures do not provide a ground for distinguishing the AM cases from FM rule making proceedings. Previously, the Commission's procedures required conflicting AM applications to be filed by a cut-off date or be precluded, just as with FM petitions.

position. In each of those cases the court found an agency's notice to be inadequate when the agency took action ***other*** than what was proposed in the notice. Here, the Commission did ***exactly*** what it proposed to do. It specified a date by which counterproposals must be filed, it accepted the Joint Parties' timely filed counterproposal, and it afforded that counterproposal cut-off protection, just as it said it would. ***See Notice,*** 15 FCC Rcd 15809, 15814 (2000).

7. The Commission commented in ***Pinewood*** that it does not identify in an FM notice of proposed rule making the other possible allocations which may be considered in the proceeding, and hence the other possible allocations which might be affected thereby, for the simple reason that it is plainly impossible to do so, as such notice would be dependent upon any subsequently filed counterproposals. Therefore, the very best notice the Commission can give in a notice of proposed rule making to potential counterproponents is to inform them that any timely filed counterproposals will have a preclusive effect and to warn all such parties that they delay filing their proposals at their peril. Under these circumstances, there is simply nothing more the Commission can do to give notice to potential counterproponents, and that is exactly what the Commission did in this situation. Accordingly, the Commission's procedures cannot be said to have violated the "logical outgrowth" test.

8. Crawford implicitly recognizes the impossibility of the burden he is attempting to impose upon the Commission – i.e., to give public notice about matters of which it has no knowledge – and is reduced to proposing a meaningless "test" to govern when the Commission's failure to do the impossible deprives potential counterproponents of adequate notice. Crawford argues that the test should be whether an FM counterproposal is "within the ambit of the initial proposal as viewed in the eyes of citizens such as Mr. Crawford." Application for Review at 12. Of course, such a "test" is really not a test at all. It is completely subjective and, if adopted, would be unworkable and subject to endless and unresolvable second-guessing. A prospective

counterproponent could wait and hope than no one files a conflicting proposal, and then when it turns out that such a conflicting proposal is filed, argue that it was not foreseeable. Virtually every FM rule making proceeding would be subject to litigation over the manufactured issue of foreseeabililty. Moreover, Crawford's test would undo settled law that a channel substitution meets the "logical outgrowth" test and complies with the **APA,** since it would permit a claim that the substituted channel was not foreseeable.

III. Even if Considered in Connection with MM Docket 00-148, Crawford's Benjamin and Mason Proposals Would Have Been Denied.

9. The second reason that Crawford's attack on the Commission's rule making processes is unfounded is that his Benjamin and Mason proposals would not have been favored under the Section 307(b) analysis that the Commission is required to undertake when confronted with conflicting proposals. ***See*** 47 U.S.C. § 307(b). Crawford would have the Commission believe that if only he had known to file his proposals by October 10, 2000 (instead of seven months later), things would somehow be different. But things would not be different. When deciding among conflicting proposals in a rule making procedure to amend the FM Table of Allotments, the Commission weighs the competing proposals according to well-established criteria. ***See Revision of FM Assignment Policies and Procedures,*** 90 F.C.C.2d 88 (1982); 47 U.S.C. § 307(b). Clearly, the Joint Parties' proposal, providing first local services to several large communities, would have been preferred over Crawford's 6th FM channel at Mason (population 2,134), or first local service at Benjamin (population ***264).***

10. According to Crawford's initial petitions, his desire was simply to apply for new stations at Benjamin and Mason. But as a result of recent allotments, Crawford can file an application for a new station at Mason and/or at Benjamin as soon as the applicable window

filing period opens.[5] Thus, if Crawford's goal in filing this petition for reconsideration is to achieve the opportunity to file applications for new stations at Benjamin and at Mason, that opportunity will be forthcoming and his Application for Review can be dismissed as moot. However, without going out on a limb, it is not too hard to believe that Crawford had other things in mind than constructing radio stations to provide a 6" (now 7th) FM channel at Mason (population 2,134), or first (now second) local service at tiny Benjamin (population 264). As the Media Bureau is well aware, Crawford alone has filed petitions for at least forty-three new allotments. ***See*** Letter from Roy J. Stewart, Chief. Mass Media Bureau to Charles Crawford (March 1, 2002). The Bureau is on record with its doubts that Crawford is capable of applying for and constructing all of the facilities in which he has expressed an interest. ***Id.*** Although the Bureau did not pursue this matter, it was not because it changed its mind about Crawford's financial qualifications to operate all of the stations for which he has petitioned.

IV. If Crawford Could Have Filed His Benjamin and Mason Proposals Earlier, Then He Should Have Done *So,* and Any Resulting Preclusion is Of His Own Making.

11. Crawford's entire argument rests on the premise that he controlled the timing of his Benjamin and Mason proposals. But this premise is self-defeating. If, indeed, Crawford could have filed his proposals by October 10, 2000, then he had no business waiting seven more months to file as he did. The Commission warns parties interested in filing petitions not to wait. ***See Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, 8*** FCC Rcd 4743, 4745 (1993). Parties should file their proposals as early as possible because others are filing applications to change sites, or petitions/applications to upgrade the class of channels, or to simply change channels. Proposals are continuously being

[5] On June 5,2002, in the same Mason proceeding at issue here, the Commission allotted Channel 269C3 to Mason as its 6th FM channel (see DA 02-1389), and on July 17,2002 in MM Docket No. 01-280 the Commission allotted Channel 237C3 at Benjamin as its first local service (see DA 02-1765).

filed and may inadvertently conflict with other pending proceedings even though the petitioner did not intend to create a conflict. Therefore, if Crawford finds himself precluded because he did not file by October 10, 2000, and instead waited seven months until late May, 2001 to file, that preclusion is entirely of Crawford's own making.

V. Crawford's Arguments With Respect to the Joint Parties are Speculative and Incoherent.

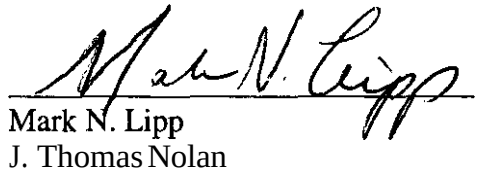
12. Rawhide has not only addressed Crawford's speculations and accusations concerning the circumstances surrounding the filing of the Quanah petition and the Joint Parties' alleged involvement, it bas gone further and explained why Crawford's speculations are wrong. The Joint Parties had been working on their proposal since 1998, and were forced to file in the MM Docket 00-148 or forever be precluded from doing so. As it turned out, the Joint Parties' proposal was *not* ready for filing by the comment date in that proceeding, despite the Joint Parties' diligent efforts to complete their preparations in time. Crawford's speculation that the Joint Parties were involved in a scheme with the Quanah petitioner makes no sense at all, because the Joint Parties would not intentionally set a deadline for themselves that they could not meet. Having taken so long to make a complicated proposal acceptable, the Joint Parties would not risk all of their time, hard work and expense on the chance that they would not be ready to file when the deadline came.

13. Crawford simply refuses to accept the Joint Parties' logical explanation, preferring to believe in his own conspiracy theory. The Commission need not be deluded, however, and should not be taken in by Crawford's determined effort to direct attention away from the real matters at issue here

WHEREFORE, for the foregoing reasons, the Commission should deny Crawford's Application for Review.

Respectfully submitted,

RAWHIDE RADIO L.L.C.

By: 

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February 19, 2003

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CERTIFICATE OF SERVICE

I, Kay D. Dallosta, a secretary at the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 19th day of February, 2003 caused to be mailed by first class mail, postage prepaid, copies of the foregoing " **Opposition To Application for Review**" to the following:

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